

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

0-0

COURTNEY JAYNE, individually and as
Personal Representative of the Estate of Maggie
Zaiger,

4:18-cv-04088-KES

Plaintiff,

STATEMENT OF UNDISPUTED MATERIAL FACTS

VS.

CITY OF SIOUX FALLS,

Defendant.

0-0

Defendant City of Sioux Falls submits this statement of undisputed material facts pursuant to Fed. R. Civ. P. 56(c) and D.S.D. Civ. LR 56.1.

1. The Big Sioux River is a tributary of the Missouri River that runs through Sioux Falls.
2. Falls Park is a 123-acre public park surrounding the falls of the Big Sioux River located in north central Sioux Falls. (Hall Dep. at 124.)
3. Approximately 700,000 people visit Falls Park every year. (Hall Dep. at 12-13.)
4. Falls Park has natural hazards including turbulent water with undertows, uneven or jagged quartzite rock formations that can be slippery when wet, and periodic foam. (Hall Dep. Ex. 28.) The buildup of foam is a natural condition that regularly occurs during spring runoff. (Hall Dep. at 53.)
5. To address safety issues in all City facilities, including Falls Park, the City established a Risk Management Plan. (Hall Dep. Ex. 23 at 2; Hall Dep. at 11, 13-14.)

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6. Under the Risk Management Plan, the City's Risk Management Division works with the Department of Parks and Recreation. (Ex. 23 at 4.)
7. City personnel conduct safety reviews of Falls Park every year. (Hall Dep. at 13-14.)
8. Since 1980, ten people have drowned in Falls Park. (Hall Dep. at 127.)
9. Before the events of the present case, the most recent drowning occurred in 2013. (Hall Dep. Ex. 26.)
10. On March 14, 2013, 6-year-old Garrett Wallace visited Falls Park with his 16-year-old sister, Madison, and several other children. (Fischer Dep. Ex. 18.)
11. Garrett fell into the river while playing in foam that had accumulated on the river's surface. (*Id.* at 2.)
12. The foam was estimated to be between 10 and 15 feet deep. (*Id.* at 3.)
13. Madison jumped in after Garrett. (*Id.* at 2.)
14. A bystander, Lyle Eagle Tail, jumped in after Madison. (*Id.* at 2.)
15. Garrett managed to pull himself out of the river. (*Id.* at 2.)
16. Madison and Lyle drowned. (*Id.* at 7-8.)
17. Following the March 2013 incident, City personnel conducted a special review of Falls Park. (Mieras Dep. Ex. 21.; Mieras Dep. at 14; Hall Dep. at 27-28; Peterson Dep. Ex. 6.)
18. The City personnel involved in the review included: Jim Sideras, Sioux Falls Police Chief; Doug Barthel, Chief of Police; Dave Pfeifle, City Attorney; Regan Smith, Sioux Falls Fire Rescue; Don Kearney, Director of Parks & Recreation; and Mike Hall, Risk Manager. (Mieras Dep. Ex. 21.)

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19. Doug Kirkus of Safety Benefits, a third-party safety and loss-control consultant, also reviewed the 2013 incident. (Mieras Dep. at 19.)

20. Mike Hall considered Doug Kirkus to be effective and knowledgeable. (Hall Dep. at 76.)

21. The 2013 incident review focused on optimizing rescue efforts. (Hall Dep. at 27-29.)

22. The 2013 incident review did not analyze what attracted Garrett to the water. (Hall Dep. at 28.)

23. The City did not consider the buildup of foam to be a hazard after the 2013 drownings other than as an impediment to rescue. (Hall Dep. at 40, 41, 42, 46, 66, 74, 75; Mieras Dep. at 24-25; Sideras Dep. at 35; Kearney Dep. at 29,30.)

24. The City did not consider the risk of foam to visitors to be different than the risks presented by the river and slippery rocks. (Hall Dep. at 33-34, 75; Sideras Dep. at 28-29.) The City's human factors expert, Ken Nemire, agrees. (Nemire Dep. at 54-55.)

25. As part of the 2013 incident review, the City discussed a number of options to address conditions in Falls Park, including fencing, additional signs, the language in the signs, the use of temporary barricades, park rangers, placing rescue devices like throwable flotation rings in the park, the use of technology, the placement of anchors for first responders, and the use of de-foaming chemicals. (Ex. 6, Ex. 21; Hall Dep. at 29, 50, 95, 108, 153-54; Mieras Dep. at 21; Sideras Dep. at 39-40, 44, 46.)

26. The City considered the foam to be open and obvious. (Hall Dep. at 38.) The City's expert agrees. (Nemire Dep. at 54-55.)

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27. As a result of the 2013 incident review, the City updated the language of existing warning signs and added signs to Falls Park. (Kirkus Dep. at 31; Sideras Dep. at 46; Mieras Dep. at 21; Hall Dep. at 29.)

28. The updated signs caution park visitors: “Slippery Rocks,” “No Swimming,” “Turbulent Water,” and “Supervise Children.” The sign also advises parents to “keep [children] a safe distance from the water’s edge.” The sign also features pictograms with its warnings, including one depicting a person slipping off a rocky ledge. (Fischer Dep. Ex. 19; Mieras Dep. at 36.) The sign is depicted below.



29. Joellen Gill, a human-factors expert retained by Jayne, agreed that warning signs are necessary in Falls Park and that the content of the City’s sign, including the pictograms, was good, but she testified that the sign should have warned about foam. (Gill Dep. at 45, 53.) She also testified that the sign was not compliant with ANSI Z535 because the signal word was *Caution* rather than *Danger*, and the background color should have been red rather than yellow. (*Id.* at 51-52.) She also thought that there were some additional places in Falls Park where a sign should have been located. (*Id.* at 48-49.) Ken Nemire, a human factors expert retained by the City, testified that the sign is in compliance with the 2002 version of ANSI Z535, but the current

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version would require use of the signal word *Danger* and a background color of red. (Nemire Dep. at 215.) Nemire testified that he did not think Gill's proposed changes to the sign would make any difference in the sign's effectiveness, and the sign has "all the pieces that make it an effective warning." (*Id.* at 218-219.)

30. As a result of the 2013 incident review, the City installed anchor points in the quartzite rock for repelling and safety lines in rescue operations. (Ex. 21 at 1; Mieras Dep. at 14.)

31. The City considered but rejected placing life rings and similar rescue devices because of Fire Rescue's concern that such devices are ineffective in turbulent water and that they may actually encourage others to attempt rescues and become additional victims. (Hall Dep. Ex. 28 at 5)

32. The City considered but rejected the use of defoaming agents based on information received from the fire department that dissipating the foam is not practical. (Hall Dep. at 50.)

33. The City considered but rejected fencing because: (1) it could impede first responders' rescue operations; (2) it could only deter and not prevent access; (3) it was difficult to determine where a fence should start and stop; and (4) fencing only particular areas could create a false sense of security in unfenced areas. (Ex. 28; Sideras Dep. at 39-44; Goodroad Dep. at 26, 30, 33, 36, 40, 55; Mieras Dep. at 21, 42.)

34. The City considered and rejected as not feasible fencing all of the river in Falls Park. (Hall Dep. at 153-54.)

35. City personnel involved in the 2013 incident review were not aware that children were attracted to the foam. (Sideras Dep. at 49; Mieras Dep. at 25, 52, 67; Hall Dep. at 41.)

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36. In July 2016, the City hosted a training exercise sponsored by the South Dakota Public Assurance Alliance (SDPAA) and conducted by Mary Beth Martinez of O’Connell Consulting.¹ (Martinez Dep. at 20-21.)

37. The July 2016 training exercise was not a risk assessment. (Hall Dep. at 78-79; Martinez Dep. at 40-41.)

38. Martinez did not recommend portable fencing or increased patrols. (Martinez Dep. at 92.)

39. Martinez opined that City employees were “exceptionally knowledgeable about their operations and the potential risk exposures they manage, with the goals to protect life, protect property, and to ultimately minimize losses to the city, and, thus, to the SDPAA[.]” (Martinez Dep. at 93, 100.)

40. Martinez opined that City Risk Manager Mike Hall “has a broad understanding of complicated local government liability exposures and works closely with each department, ensuring successful outcomes[.]” (Martinez Dep. at 93.)

41. Martinez opined that “[t]he [C]ity understands and practices effective risk management[.]” (Martinez Dep. at 94, 100.)

42. Martinez opined that City “Parks and Recreations has long-term knowledgeable employees who practice effective risk management[.]” (Martinez Dep. at 94-95.)

43. Judith Payne was the executive director of the SDPAA. She previously served as the Risk Manager for the State of South Dakota for 18 years. (Payne Dep. Ex. 10.)

1. Mary Beth Martinez was known as Mary Beth O’Connell prior to marrying in 2010. Although she changed her surname, she continues to do business as O’Connell Consulting. (Martinez Dep. at 8.)

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44. Payne opined that “the City of Sioux Falls practices GREAT risk management.”
(*Id.*)

45. Payne opined that “every City employee and service provider we interviewed and who toured us around their facility appeared very knowledgeable about all things risk management. All were passionate about keeping the general public, employees, and facilities as safe as possible.” (*Id.*)

46. Following the March 2013 drownings, there were no other drownings at Falls Park until Maggie Zaiger drowned. (Bakke Dep. Ex. 31.)

47. On March 18, 2018, Maggie Zaiger visited Falls Park with her mother, Courtney Jayne, her sisters, Grace and Myah Zaiger, her mother’s friend Cris Melendez, and Melendez’s children, Jeremy and Olivia Irlbeck. (*Id.*)

48. Jayne, Melendez, and their children were visiting from Iowa. (*Id.*)

49. Upon arriving at Falls Park, the group first visited the observation deck at the visitor’s center. (Jayne Dep. at 23-25.)

50. After leaving the observation deck, sometime around noon, the group walked toward what they thought was a snow pile. (Jayne Dep. at 29-30.)

51. The snow pile was actually foam that had accumulated in the river channel. (Ex. 31.)

52. One police officer later estimated the foam’s depth to be between 20 and 30 feet at its deepest point. (*Id.*) That much foam in that location was unusual. (Mieras Dep. at 27; Hall Dep. at 55.)

53. According to the police report, Jeremy and Maggie approached the foam, and Jeremy played with the foam. (*Id.*) Cris Melendez testified that Jeremy did not play in or touch

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the foam. (Melendez Dep. at 38, 45, 47.) She also testified that Maggie was not playing in the foam before she fell into the river. (*Id.* at 45-46). Melendez has refused to allow Jeremy to give testimony in conjunction with these proceedings.

54. Maggie Zaiger fell in to the river about the time that Cris Melendez was in the process of taking photographs of some of the children. (Melendez Dep. at 33-34). No one saw Maggie fall into the river.

55. Jayne, who estimated that she was 10 feet away from Maggie, did not see Maggie fall in because she was assisting her daughter Myah. (Jayne Dep. at 32-33, 42.)

56. After Maggie fell in, Jeremy said “Mom, she’s gone.” (Melendez Dep. at 31.)

57. Maggie fell into the river in the same general location where Garrett Wallace’s rescuers drowned in 2013. Jayne and Melendez attempted to locate Maggie but were unable to find her. (Ex. 31. at 3; Melendez Dep. at 41-42; Jayne Dep. at 42-43.)

58. Rescuers located Maggie approximately 15 minutes after she fell in. (*Id.*)

59. Maggie was transported to Avera McKennan Hospital. Despite the efforts of hospital staff, Maggie was pronounced dead at approximately 1:00 p.m. (*Id.* at 3.)

60. Following the March 2018 incident, City personnel conducted a special review of Falls Park. (Hall Dep. Ex. 29.)

61. As a result of the review, the City has constructed a new viewing platform at the location where Maggie Zaiger fell into the river. The viewing platform is intended to keep visitors from being in the rocks near the edge of the river in that area. (*Id.*)

62. Only two of the drownings at Falls Park involve the natural buildup of foam in the river channel. (Gill Dep. at 42.)

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Dated this 1st day of October, 2019.

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